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No. 85-6004

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BRET CLARK,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

JURISDICTIONAL STATEMENT OF APPELLANT

APPEAL FROM AN ORDER OF THE FIFTH DISTRICT
COURT OF APPEAL, STATE OF FLORIDA

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QUESTION PRESENTED

Is Florida Statute Section 57.105 unconstitutional and thus void?

BASIS FOR JURISDICTION

Appeal is taken from an order of the 5th District Court of Appeal, State of Florida, rendered in connection with an appeal proceeding in that court on September 12, 1985. The order upheld the validity of the statute in question after appellant had drawn its validity in question, as being repugnant to the Constitution and laws of the United States. Since no appeal thereof is available to the Florida Supreme Court, the Notice of Appeal was filed with the Fifth District Court of Appeal on December 2, 1985. This Court therefore has jurisdiction under 28 U.S.C. Section 1257(2).

AUTHORITIES INVOLVED

United States Constitution, amendment I:

Congress shall make no law . . .
abridging the freedom . . . to
petition the Government for a re-
dress of grievances.

United States Constitution, amendment XIV:

No State shall . . . deprive
any person of life, liberty,
or property, without the due
process of law; nor deny to any
person within its jurisdiction
the equal protection of the laws.

Florida Statute Section 57.105 (1985):

The court shall award a re-
asonable attorney's fee to the
prevailing party in any civil
action in which the court finds
that there was a complete absence
of a justiciable issue of either
law or fact raised by the losing
party.

STATEMENT OF THE CASE

An appeal proceeding was pending in the Fifth District Court of Appeal, State of Florida. During the course of this proceeding, the appellant filed motions and sent correspondence to the court that were

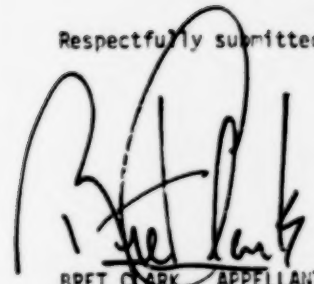
highly critical of the manner in which the court from which the appeal was taken, and the Fifth District court, had handled the case. In response to one such letter, the Clerk of the Court replied by inviting appellant to file a pleading with the court, which appellant did. The opponent of appellant then filed a response, bitterly denouncing appellant and asking that the court "review the correspondence and pleadings in this cause" before punishing appellant by assessing attorney's fees against him. Appendix at A-4. The Court agreed, entering an order to that affect. Appendix at A-5.

Appellant then filed a motion to review the order granting attorney's fees, raising for the first time his contention that the statute relied upon is repugnant to the Constitution and laws of the United States. Appendix at A-13 to A-16. This motion was then denied on September 12, 1985. Appendix at A-1. Appellant then wrote to the Supreme Court of Florida to confirm that the order could not be appealed to that court. Appendix at A-17. By letter dated November 14, 1985, the Florida Supreme Court confirmed this fact. Appendix at A-18. The notice of appeal was then filed with the Fifth District Court of Appeal. Appendix at A-2.

IMPORTANCE OF QUESTION

The question presented is so substantial as to require plenary consideration because the issues effect the right of individuals to gain access to the courts, and to complain to a court about mistreatment. The Fifth District Court of Appeal of the State of Florida obviously does not welcome criticism of the way it operates, and has abused its powers in order to punish appellant for his attempt to do so. The assessment of attorney's fees against him is not compensatory, as his opponent is an employee of the State who is paid a salary. There was no allegation that appellant brought his appeal in the State courts in bad faith or for oppressive reasons, which is a basis for assessing attorney's fees under federal case law. The statute relied upon to impose these fees turns upon the vague concept of what constitutes a "justiciable issue." Consequently, litigants are forced to guess as to its meaning, and are therefore deterred from seeking relief in Florida courts. For these reasons, the Court must give plenary consideration to this appeal.

Respectfully submitted,



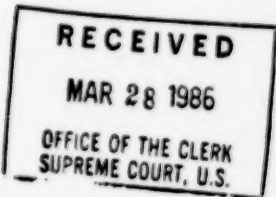
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ORIGINAL

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BRET CLARK,
Appellant,
v.
STATE OF FLORIDA,
Appellee.



MOTION TO DISMISS
APPEAL FROM AN ORDER OF THE FIFTH DISTRICT
COURT OF APPEAL, STATE OF FLORIDA

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AUTHORITIES CITED

<u>CASES</u>	<u>PAGE(S)</u>
<u>Gernat v. Gernat,</u> 378 So.2d 339 (Fla. 4th DCA 1980)	3
<u>Hanson v. Denckla,</u> 357 U.S. 235, 244 (1958)	4
<u>Jones v. Fox,</u> 23 Fla. 462, 2 So. 853 (Fla. 1887)	4
<u>Sarmiento v. State,</u> 371 So.2d 1047 (Fla. 3d DCA 1979)	4
<u>Special Disability Trust Fund v. Wareham, etc.,</u> 381 So.2d 257 (Fla. 1st DCA 1980)	3
<u>State v. LoChiatto,</u> 381 So.2d 245 (Fla. 4th DCA 1979)	3

OTHER AUTHORITIES CITED

Art.V, §4 (b)(3), Fla. Const. (1981)	1
Art. V, §5 (b), Fla. Const. (1981)	1
Fla. R. App. P. 9.330	4
Fla. R. App. P. 9.330 (a)	2
Fla. R. App. P. 9.400, comm. n. 3	3
Fla. R. App. P. 9.400 (b)	3
Fla. R. App. P. 9.400 (c)	3
§26.012(1), Fla. Stat. (1983)	1
§57.105, Fla. Stat. (1983)	2,3

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BRET CLARK,

Appellant,

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STATE OF FLORIDA,

Appellee.

MOTION TO DISMISS

The appellee moves the Court to dismiss the appeal herein since it seeks review of a state court proceeding which involved no federal question; to the extent a federal question was at all raised by the appellant, it was neither timely nor properly raised and thus not expressly passed upon. Rule 16.1 (b).

NATURE OF THE CASE AND THE PROCEEDINGS BELOW

Petitioner Clark received a speeding ticket. He contested the speeding ticket, went to trial, and was found guilty and fined.

Under the combined provisions of Article V, Section 5 (b) of the Florida Constitution (1981), and section 26.012 (1), Florida Statutes (1983), Clark was entitled to appeal the finding of the county court. He did so and on September 4, 1984, the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Lake County, sitting in its appellate capacity, affirmed the judgment of the county court without opinion.

Further appellate review was possible by seeking a writ of certiorari in the District Court of Florida, Fifth District. Art. V, §4 (b)(3), Fla. Const. (1981). Florida Rule of Appellate Procedure 9.100 (c), requires that a petition for writ of common law certiorari be filed within thirty (30) days of the rendition of the order sought to be reviewed or, in this case, no later than October 4, 1984.

On February 14, 1985, some four months after the required

filing date, Clark filed his petition, and on March 12, 1985, the Fifth District Court of Appeal ordered the state to show cause why the petition should not be granted. (A 1) On March 28, 1985, the state filed its response which contained a position raising the jurisdictional bar based on the untimely filing of the petition. (A 8)

On April 15, 1985, the appellate court issued its order dismissing the petition for lack of jurisdiction. On April 30, 1985, Clark filed a motion for rehearing. (A 13) As is indicated on page 15 of Clark's appendix to his jurisdictional statement, that motion was stricken as untimely. (See, Fla. R. App. P. 9.330 (a)) Over a month later, Clark filed a motion to recall mandate and a suggestion for reconsideration. (A 15) The state promptly responded and for the grounds set forth therein, moved for attorney's fees. (A 16) The court just as promptly denied the motion for recall and gave Clark five days within which to show cause why the motion for attorney's fees should not be granted. (A 18) In the meantime, Clark filed a reply to the state's response. (A 19)

Clark responded to the order to show cause on July 17, 1985, (A 22) and on July 25, 1985, the court granted the state's motion for attorney's fees. (A 25)

Almost a month later, Clark filed a motion to review the order granting fees, (A 26) and in a concluding paragraph, as an apparent afterthought, contended for the first time that the Florida statute under which the attorney's fees were moved was "repugnant to the constitution and the laws of the United States of America." (A 27) On September 12, 1985, the appellate court denied the motion, (A 28) and it is from this order that Clark appeals.

ARGUMENT

The invalidity of section 57.105, Florida Statutes, for any reason and/or its repugnancy to the United States Constitution was neither timely nor properly raised in the proceedings below. In fact, the statute is wholly inapplicable to what

transpired. While it is true that the state moved for attorney's fees pursuant thereto, what Clark has overlooked is the fact that attorney's fees were awarded pursuant to Florida Rule of Appellate Procedure 9.400 (b). (A 25) Clark, at least at one time, recognized this since his motion to review the order granting fees was predicated upon that particular rule. (A 26)

It is thus clear that the constitutional validity of the state statute was never passed upon by the court below. Indeed, it is being more than charitable to assume that the court was even presented with the constitutional challenge, however late. Under Florida law, it has been held that the time to object to an award of appellate attorney's fees is by appropriate motion prior to the court's consideration of the motion for assessment. Special Disability Trust Fund v. Wareham, etc., 381 So.2d 257 (Fla. 1st DCA 1980). In addition, the court there went on to observe that attorneys should always help a court in its consideration of all issues presented to it by timely and fully presenting the court all authorities, pro and con, on the issues.

Compliance with this principle indicates that Clark was required to have raised all reasons why he should not be assessed attorney's fees when specifically given the opportunity to do so by the court of appeal. This he did not do. If he thought that section 57.105 was invalid for any reason whatsoever as a source for properly awarding attorney's fees, then he should have "raised" that issue at the appropriate time.

Admittedly, rule 9.400(c) contains provisions for a review of orders assessing attorney's fees; such review, however, is more appropriately sought when an appellate court determines the right to attorney's fees and remands the cause to the lower court for purposes of fixing those fees. Should a party be aggrieved by said "fixing", then the party may return to the appellate court for review. This was explained in Gernat v. Gernat, 378 So.2d 339 (Fla. 4th DCA 1980); see also, Fla. R. App. P. 9.400, committee note 3; State v. LoChiatto, 381 So.2d 245 (Fla. 4th DCA 1979).

Our research reveals no case dealing with the situation in which an appellate court has assessed attorney's fees under Florida appellate procedural rules. However, based on the above, when an appellate court does assess attorney's fees, it is our contention that such an act is just like any other appellate court decision. As such, either a motion for rehearing and/or clarification pursuant to Florida Rules of Appellate Procedure 9.330 is the sole appropriate vehicle to seek further consideration. That rule requires that a motion be made within fifteen (15) days of the order. If one were to view Clark's motion to review as such a motion for rehearing and overlook the fact that it would have been untimely under that rule, then it is still seen that the question of the validity of the statute was still not properly raised. Under Florida law a party seeking rehearing under rule 9.330 may only raise points of law or fact that have been overlooked or misapprehended by the court. Re-argument or arguments raised for the first time are simply not permitted. Sarmiento v State, 371 So.2d 1047 (Fla. 3d DCA 1979). This procedural requirement has been the law in Florida for a hundred years. Jones v. Fox, 23 Fla. 462, 2 So. 853 (Fla. 1887), and has indeed been recognized by the court as the status of Florida law. Hanson v. Denckla, 357 U.S. 235, 244 (1958).

CONCLUSION

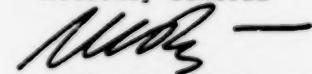
This case, although the subject of considerable judicial attention, has been troubled by two common elements -- untimeliness and only casual observance of proper state procedural rules. Every pleading Clark filed after the affirmance of his speeding ticket was either late or inappropriate and filed with but a minimal knowledge of relevant procedure. That which started him litigating in the Fifth District Court of Appeal was filed almost four months late. Even after being informed that the court was without jurisdiction to entertain the petition, Clark nevertheless persisted in his efforts to obtain something to which he was not legally entitled under state law. When that persistence resulted in a motion for

him to pay for the state's costs in the litigation, he was given an opportunity to show cause why such an assessment should not issue. At most, Clark only offered reasons which had nothing to do with the purpose of the motion. Contrary to his belief, the state did not seek punishment for Clark; rather, it only sought reimbursement for the time one of its attorneys had to spend representing the state in an action in a court which had determined that it was without jurisdiction to act. The decision of the court of appeal was one neither of vengeance nor spite. It was an act determining the existence of a right to be reimbursed.

Clark never raised the constitutionality of the statute which was not the basis of the court action and if he did, it was in an improper and untimely fashion with the result that the federal question made the basis of his appeal was non-existent below. Accordingly, the state respectfully requests the Court to enter its order dismissing this appeal.

Respectfully submitted,

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